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COMMUNITY AND SEPARATE PROPERTY

Louisiana (also Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington and Wisconsin) is a Community Property state. We are also a *civil law* jurisdiction (Napoleonic Code) as opposed to common law which the other 49 states use. A single, widowed, or divorced person owns separate property. A married person can own separate property and community property. Separate property of a married person would be property acquired *during* their marriage through a gift or inheritance, or even a personal injury award. All other property of a married person is community property; such as earnings, interest, dividends - even from separate property. Louisiana law presumes that all assets of a married person are community property, unless conclusively presumed otherwise. A common occurrence is when separate property becomes "commingled" with community property – usually transforming its character into that of community property.

MARRIAGE CONTRACTS (PRENUPTIAL AGREEMENTS)

Before marriage, a couple may enter into an agreement which may sever the Louisiana "community property" regime or the "community of acquets and gains." There are many issues involved in drafting a solid matrimonial agreement but the two most common ways are: 1) to completely sever the community property system and each of the couple's respective property will *always* be separate, e.g. earnings, assets, dividends; or 2) to keep any earnings/dividends, rental income, interest on investments, etc., derived from separate property as a separate asset during the marriage, yet to embrace the community property regime on all other assets acquired during the marriage.

A presently married couple may enter into a contract to terminate the community property regime, but they must first petition the court and have the agreement signed by a judge. A married couple moving into Louisiana has *one year* to enter into such a contract without having to obtain court approval.

DYING INTESTATE (WITHOUT A WILL) IN LOUISIANA

When a person dies, their estate includes all of their separate property and their undivided one-half interest in their community property. If you do not have a will, the laws of Louisiana will make one for you. This is what is called dying "intestate." All of the decedent's share of the community property will go equally to all children, regardless of age, subject to the *usufruct* (defined below) of the surviving spouse. The usufruct to the surviving spouse over community property will end if the surviving spouse ever remarries. Additionally, the usufructuary (the person to whom the usufruct was granted) does not have the authority to sell, mortgage, or encumber any assets subject to this usufruct.

The decedent's separate property will go *outright and immediately* to all children, equally, with no usufruct to the surviving spouse. If the decedent has no children, the separate property would then go to the decedent's parents (usufruct) with the naked ownership to brothers and sisters, or if deceased, to their children. If there is no one left in the previous classes, then the separate property of the decedent goes to the surviving spouse.

FULL OWNERSHIP (THE LOUISIANA "BUNDLE OF RIGHTS")

In Louisiana full ownership is known as the "Bundle of Rights," consisting of three components: 1) USUS, 2) FRUCTUS, and 3) ABUSUS. Using a house as an example - the *usus* is the right to use the home and to live in it, the *fructus* is the fruits and income derived from the house (rent), and the *abusus* is the power to dispose, sell, mortgage, or encumber the house. The USUFRUCT is the combination of the first two rights. In our intestate explanation above, the surviving spouse has the usufruct, and the children have the abusus, which we call the NAKED OWNERSHIP. In order for a surviving spouse to be able to sell or refinance the house, they would need the permission of the naked owners (the children.) This can be a real problem if the children are still minors, as the court needs to appoint a "tutor" to sign on behalf of the minor children.

DYING TESTATE (WITH A WILL)

There are many reasons to make a will but the most important is usually to grant the surviving spouse with usufruct *for life* and to give them the power to have full control over the assets subject to this usufruct, including the power to *sell* or *mortgage*. This is what we estate planners call the "*super-usufruct.*" It is relatively new under Louisiana law and many attorneys have no idea that this is even allowable. The second most common reason is to allow the surviving spouse to have a usufruct over the decedent's separate property. And the third most common reason is usually to allocate the children's inheritance into a testamentary trust whereby the children do not have access to the funds until a specific age or event (for example, age 25 or upon graduation from college).

FORCED HEIRSHIP (LIMITED)

Many people are under the impression that Louisiana has abolished the laws of forced heirship. That is not true. What has happened is that forced heirship has been "limited." Prior to 1996, with some exception, forced heirship was "unlimited," meaning that the age of your child was irrelevant for inheritance purposes. Unless you met one of the twelve arcane reasons for disinherison, the most common being no communication with a child for two or more years, you had to leave your child a portion of your estate upon your death – no matter what. Where the law stands now is that your child's age is relevant. If your children have reached their 24th birthday, and are not permanently unable to manage their affairs due to a disability, then you can leave them out of your will. The new law also protects special needs grandchildren, if their parent is deceased. The amount of the forced portion is determined as follows: one forced heir must be left 25% of your estate, two or more forced heirs must be left 50% of your estate. However, this amount may never be more than a "child's portion." For example, if you have 10 children and 9 have attained the age of 24 years, then you do not need to leave child #10 25% of your estate, only a child's portion of 10%.

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Do I Need A Will?

by Ronda M. Gabb*, JD, RFC

**Board Certified Estate Planning and Administration Specialist*

You decide. When you die without having a will, you have died "intestate." That means the State of Louisiana makes the inheritance laws for you. If you have children, your estate will be divided equally among them, and if you have a deceased child who left children, they will step up into the shoes of their deceased parent. However, this inheritance of community property is subject to something called the "usufruct" of the surviving spouse (SS) who will have the use and income from the property. Usufruct terminates upon the death or remarriage of the SS, so if the SS remarries, the children become the full owners. This is where you have heard the horror stories about children forcing their parent to vacate and sell the family home in order to get their money. If that scenario concerns you - then you need a will. With a will, you can allow the SS usufruct for *life*, remarriage would be irrelevant.

Another scenario where a will may be wanted is if either spouse has separate property. Separate property is property acquired prior to marriage, or during marriage via gift or inheritance. In an intestate situation, separate property goes to the children *outright* with no usufruct to the SS. You would think the SS would be next in line, if the couple had no children. Wrong! The SS would only inherit the separate property if there were no surviving children, parents, siblings, nephews or nieces. Again, with a will, you can direct where your separate property will go or give the SS usufruct.

What if you have minor children? Not only is it important to appoint a tutor (guardian) for them of *your* choosing but you may also want their inheritance to be placed in a testamentary trust that they cannot frivolously access until a certain age or event (maybe age 25 or graduation from college). And don't forget about "forced heirship" - despite popular belief it has *not* been repealed. If you have children that are under age 24 (or special needs children of any age) *you must leave them a portion of your estate.* I often see wills where spouses have forced heirs yet leave each other everything – those wills are not valid! Louisiana law can be quite complex and even more so if there are children from prior marriages.

Summer vacation time is upon us once again. The time to do your will is *not* the day before you leave for vacation (or are going in the hospital) although that is usually when we realize we really need one. Call for your complimentary one-hour estate planning consultation *today* and get your affairs in order *before* you get on the plane or in that operating room. You'll be amazed at what peace-of-mind really is.

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DO I NEED A POWER OF ATTORNEY?

by Ronda M. Gabb*, JD, RFC

**Board Certified Estate Planning and Administration Specialist*

YES! *Everyone* needs a Power of Attorney (Louisiana Mandate). A Power of Attorney gives someone of *your* choosing the legal authority to act on your behalf without Court intervention. The person you choose is called your "agent" (mandatary).

It is important to know that a Power of Attorney ("POA") ends at the moment of your death (conversely, a Will does not take effect *until* the moment of your death). Many people have the misconception that they do not need a POA because they have a Last Will and Testament ("Will"). Again, I reiterate – a POA and a Will are two completely different documents that take effect at totally different times—one *before* your death, and the other *after* your death. Many lawyers draft Wills and claim to be "estate planning attorneys" yet they make no effort to provide protection if the client becomes *incapacitated.* A comprehensive estate plan affords you the ability to protect your loved ones during your incapacity *and* after your death.

What happens without a POA? Let's assume that Bill and Mary have been married for 40 years and Bill suffers a massive stroke and is now mentally or physically incompetent. Let's now assume that Mary needs to sell their condo in Gulf Shores, Alabama, in order to have funds to pay for Bill's additional health care needs. Can Mary simply show up at the title company to handle the sale and sign on Bill's behalf? *Absolutely not!*

If Bill did not have a POA (or a Revocable Living Trust), then Mary (or another interested party) would need to get specific court approval to be appointed "Curator" (i.e., put in control of Bill's affairs) in order to be able to sell and/or liquidate Bill's assets. This proceeding is called an "Interdiction." The person petitioning the Court needs to actually *sue* Bill and declare him incompetent. Usually, an attorney will be appointed to represent Bill. Once approved by the Court, the Curator needs to post a bond and the Court will also appoint an "under-Curator" to make sure that the Curator is properly doing his/her job. As you can imagine, this process can be humiliating, expensive, and extremely time-consuming. All of this would occur during a highly emotional time. *This can all be avoided with a properly drafted inexpensive Power of Attorney!* Do you see now why a POA is the best investment any of us can make?

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DO I REALLY NEED A HEALTH CARE POWER OF ATTORNEY?

by Ronda M. Gabb*, JD, RFC

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YES! A Health Care Power of Attorney (HCPOA) appoints a person of *your* choosing to make medical decisions on your behalf in the event you are unable to make them yourself. This document is totally different from your Power of Attorney for Assets, which allows your Agent all the powers of managing your estate. Your HCPOA does not cover the administration of your finances like the POA but allows your Agent to carry out the duties pertaining to your health issues. Your Health Care Agent has the right to first priority in your visitation, which is an extremely important issue for unmarried couples. Your Agent may also admit and/or discharge you from any medical or nursing facilities, consent/refuse/withdraw any medical treatments, contract for your health care services, and request and receive your medical records. Your Agent is also your authorized HIPAA representative.

Oftentimes I see these powers hidden deep within someone's Power of Attorney for Assets. While that practice is entirely legal, it is not as effective as having a separate HCPOA. I have been told many times by health care administrators that they prefer a *separate* HCPOA. The hospital/doctor's staff does not want to thumb through pages of detailed information, sometimes very confidential, to find the health care authority buried within. However, there is yet another reason, and the one I find the most compelling in using a separate HCPOA—you may want your Health Care Agent and your Power of Attorney Agent to be two completely different people! Your son may be a Certified Financial Planner and be the one that you would like to manage your money, but your daughter may be a Physician and be the one you want making your health care decisions.

In addition to a Health Care Power of Attorney you should also have a "stand alone" Louisiana Advance Directive or "Living Will." Generally, this document should be drafted to override your HCPOA, so it is entirely *your* directions to the physicians and hospital on what procedures you would like withheld—or not. Most of my clients do not even want to grant their HCPOA Agents the power to overrule their Living Will decisions.

A *complete* estate plan should include a properly drafted Last Will and Testament (or perhaps a Revocable *Inter Vivos* "Living" Trust), a Power of Attorney for Assets, a Health Care Power of Attorney, and a Living Will. As American Express so eloquently states,*"don't leave home without it."*

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Donations

by Ronda M. Gabb*, JD, RFC

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Lately, I am seeing more "Acts of Donation" than ever. Usually, a well-meaning (but uninformed) attorney, notary, CPA or family friend has convinced an elderly person that the best thing to do is to donate their property to their children. The main reasons for touting this recommendation are: 1) it avoids a succession, 2) it allows them to qualify for Medicaid, and 3) it decreases taxes by removing the asset from the donor's estate.

Although some of this may be true, usually after a consultation with me the donor wishes they had their property back. Here are the downsides of donating property that are not always revealed:

1) Basis issues. When you donate something, your donee gets your basis. In other words, if you inherited your home through your dad's succession and, at the time dad died, it was worth $50,000 but it is worth $250,000 today—your basis is $50,000. If you donate it to your kids, their basis is $50,000. When they sell it for $250,000, they will pay capital gains tax on the $200,000 "profit." Instead, had the kids inherited that property through succession, their basis would have been the full $250,000 "fair market value" as of the decedent's date of death. Since Louisiana Inheritance taxes have been fully repealed for deaths occurring on or after July 1, 2004, having a highly-appreciated home pass through the succession is worth every penny of the small cost of doing a simple succession (approximately $2,000).

2) Gift taxes. You can donate $12,000 (2008 figure) per year to each donee before you are subject to filing Louisiana and Federal gift tax returns and possibly having to pay gift tax. Gift tax is based on the fair market value, not the cost basis. In the example above, the donor made a $250,000 taxable gift to the children.

3) Medicaid issues. First of all, Medicaid does not look to the primary residence as a "countable resource" when determining Medicaid eligibility. Retaining ownership of your home will never disqualify you from Medicaid (provided the equity does not exceed $500,000). Medicaid will look at the Act of Donation as a "transfer for value" and could cause you to be ineligible for Medicaid benefits for 5 years!

4) Homestead exemption. If you donate *all* of your ownership, and do not retain a *usufruct,* you cannot continue to qualify for the homestead exemption. Depending on your millage rate, that donation could cost you an additional $1,300 per year or more in property taxes!

Before you decide to donate any item of significant value, come see me and let's talk about it. It very well may be the right thing to do, but don't you want to be sure? Remember, donations are *irrevocable* gifts.

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Successions Update

by Ronda M. Gabb, JD*, RFC

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Succession, also known as Probate, is a legal process whereby we transmit title and ownership of a deceased person's assets to the proper recipients. If there are any inheritance taxes due, they are paid as part of the succession process. If the decedent left a Will then the procedure is called a "testate succession" and the Will is probated (i.e., proven). The succession process transmits ownership to the proper recipients (called *legatees* under the Will). If the decedent did not have a Will, it is called an "intestate succession" and Louisiana law steps in to determine the rightful recipients (called *heirs*).

THERE ARE NO INHERITANCE TAXES DUE THE STATE OF LOUISIANA for deaths occurring after June 30, 2004, regardless of the date the succession is opened! Beginning in August 2008, Louisiana Department of Revenue will issue refunds for inheritance taxes paid for deaths occurring between July 1, 2004 and March 31, 2007.

If the decedent died prior to 7/1/2004, Louisiana's Inheritance Taxes are not so easy to compute. Each class of recipient has a different exemption amount. For example, a spouse is totally exempt (but only since 1992), each child has a $25,000 exemption, and a non-related party only gets a $500 exemption. The tax rate ranges from 2% to 10%, depending on the estate's value and the relationship to the decedent. Penalties and interest begin to accrue after the ninth month of the date of death, regardless of whether or not a succession has been opened.

If the decedent's assets were $2,000,000 or less (2008 figure), no Federal Estate Taxes are due either. In 2009, the Federal Estate Tax exemption will be $3,500,000.

A succession must be completed (or at least opened) in order to sell real property that the decedent owned. This is true even if the decedent's Will left all of his property to his spouse. If property is being sold, the succession is needed to change title on that property from the deceased husband's name to the wife's name only (or to the children with a "usufruct" to the wife if there was no Will). The final and most important document issued in a succession is called the "Judgment of Possession." It acts as a "deed" to transfer title to real estate, or to transfer title to vehicles, bank accounts, stocks, brokerage accounts, business interests, etc.

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Medicaid Planning

by Ronda M. Gabb*, JD, RFC

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So what is "Medicaid Planning" and how does it affect us, our parents and grandparents? As I have always said, being in a Medicaid nursing home should not be our estate planning goal. Hopefully our first goal is to live as healthy a lifestyle as possible and lessen our chances of being infirmed, or in the event we do become disabled, to have a strong long term health care insurance (LTHCI) policy where we have the resources to have someone take care of us *in our own home.* However, many of us do not have that luxury. Maybe we are uninsurable for an LTHCI policy, maybe we can't afford one, or the most common scenario I see – the incapacitated person is about to make application to the Medicaid nursing home facility because they have already gone through the majority of their resources.

Before qualifying for Medicaid one must practically be a pauper. If the applicant is single, her assets cannot exceed $2,000, but there are some "exempt" assets such as your home and your car. And there are many legitimate ways to "spend down" what may be left of a person's assets on things they will need *before* they enter the nursing home. In many cases, planning *after* one applies for Medicaid eligibility is too late. Many of the planning opportunities need to be done at least a few months ahead of time, but *most* need to be done *years* ahead of time. Since February of 2006, the Medicaid "look back" period has been lengthened to 60 months, or five years ahead of time!

One of the best things to do for a person contemplating applying for Medicaid nursing home benefits is to schedule them (and their spouse/children/caretaker) a Medicaid Planning consultation with an attorney that has expertise in this particular area. The attorney can explain the pros and cons of the myriad of Medicaid planning opportunities as well as warn you about possible obstacles in the process. Time and again clients will come to me saying that their "family attorney" just told them to give away everything to the children and then apply for Medicaid. Most of the time, that advice is laced with problems, from not filing the proper gift-tax returns (and paying gift tax!), to almost guaranteeing that the applicant may not receive benefits for 5 years, or more! All planning must have been done properly from the beginning. A comprehensive Medicaid consultation can leave you feeling confident that your choices were *legally* the best planning opportunities available and can guide you more easily through the Medicaid application maze.

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The Age 65+ Homestead Exemption

by Ronda M. Gabb*, JD, RFC

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As an estate planning attorney, it is no surprise that many of my clients are age 65 or older. What is a surprise is that many of them have no idea that they may qualify to freeze their present Homestead Exemption assessment amount! This "Assessment Freeze" has been in effect since January 1, 2000 when we amended our Louisiana Constitution.

The amendment states that if you are age 65 or older and have an Adjusted Gross Income (AGI) on your Federal Income Tax Return of $50,000 or less (adjusted to inflation beginning in 2001, which means that in 2007 your AGI must be below **$62,180**) then you may file to freeze your home's assessed value permanently! The "permanent" part was a great recent addition that we, as voters, passed in November of 2002. Under the prior law, one had to prove the meeting of the AGI requirements annually. Now, if you qualify for the AGI requirement and receive the assessment freeze – you are *permanently* qualified!

So, what exactly does an "assessment freeze" mean? Let's say in 2003 you buy a home worth $100,000, then it is "assessed" at 10% of the fair market value which comes to 10,000. Now you take your 7,500 homestead exemption (that is why people believe that we have a "$75,000" homestead exemption because mathematically it would zero out the Parish property taxes on a $75,000 home) and subtract it for a total taxable assessed value of 2,500. If your millage rate is 175 mills then your property tax would be $437.50 (2,500 x .175 = 437.50). Now let's say it is 2010 and your new fair market value of your property is $200,000. Your new "assessed" value would be 20,000 less the 7,500 homestead exemption, for a taxable assessed value of 12,500 (20,000 less 7,500). Doing the math, your property taxes would now be $2,187.50 (12,500 x .175 = 2,187.50), a difference of $1,750.00 (2,187.50 less 437.50)! Had your assessed value been "frozen" at 10,000 you would still be paying the same amount as in 2003 (assuming the millage rate had not increased).

This is an incredible feature for our Senior Citizens who may not have the same amount of disposable income they had when working. You can apply for this "freeze" by visiting either of Assessor Core's offices, in Covington or Slidell, or by mail, using the form on the reverse side. You must bring/send your proof of age and a copy of the first page of your 2006 Federal Income Tax return.

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"FREEZE" YOUR CREDIT REPORT:

New Law Aims to Help Combat Identity Theft

by La. Attorney General Charles C. Foti, Jr.

In light of the recent onslaught of bogus email scams and cleverly disguised bank notices, I want to let you know there is a way to help in the fight against identity theft. In fact, Louisiana consumers have a new tool in the fight against identity theft.

Beginning **July 1, 2005,** Louisiana consumers can place a "security freeze" on their credit report. This new law will give consumers more control over who has access to their credit report, thus helping to reduce the risk of identity theft. When a consumer places a security freeze on their credit report, this prohibits a credit reporting agency from releasing the consumer's credit report or credit score without the express authorization of the consumer. A security freeze will remain on your credit report until you request it to be removed.

To place a security freeze on your credit report, you must contact each of the three major credit reporting agencies in writing. There is a $10.00 initial fee to place the freeze on your credit report with each credit reporting agency. However, this fee is waived if you are a victim of identity theft and have included a copy of the police report with your letter; or if you are 62 years of age or older. Each credit reporting agency has specific information that you must include in your letter. *

Once the credit reporting agencies receive your request for a security freeze, they must place the security freeze on your credit report no later than ten business days after receiving your written request. The credit reporting agency must also provide to you, within ten business days, a unique personal identification number (PIN) or password that you must use when providing authorization for the access of your credit report for a specific period of time. Also at this time, the credit reporting agency must let you know in writing the process of placing, removing, and temporarily lifting a security freeze and the process for allowing access to information from the consumer's credit report for a specific period while the security freeze is in effect.

Once you place a security freeze on your credit report, you can request that it be lifted. There is a charge of $8.00 per lift to temporarily lift the freeze. The credit reporting agency has three business days to honor your request.

As your Attorney General, I believe it is my duty to act as the legal protector for the health, safety and welfare of the citizens of the state of Louisiana. I believe that this new law helps me protect you from identity thieves. I encourage all of you to consider using this valuable service. If you have any questions about this new law, please contact my office at 1-800-351-4889 or visit our website at www.ag.state.la.us.

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